SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-122-D

COPPAGE CONSTRUCTION COMPANY, INC. **APPELLANT**

v. **KENTUCKY COURT OF APPEALS CASE NO. 2011-CA-121-MR**
KENTON CIRCUIT COURT CASE NO. 08-CI-2787

SANITATION DISTRICT NO. 1
AND DCI PROPERTIES DKY, LLC **APPELLEES**

BRIEF OF APPELLEE, SANITATION DISTRICT NO.1

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellee's Brief was sent via U.S. Mail, postage prepaid, on this the 7th day of August, 2014, to the following: Sheryl G. Snyder, Griffin Terry Sumner, and Jason Renzelmann, 400 West Market Street, 32nd Floor, Louisville, KY 40202; Robert B. Craig, Taft Stettinius & Hollister LLP, 1717 Dixie Highway, Suite 340, Covington, KY 41011; Chad R. Ziepfel, Taft Stettinius & Hollister LLP, 425 Walnut Street, Suite 1800, Cincinnati, OH 45202; Wm. T. Robinson, D.Scott Gurney, Frost Brown Todd, LLC, 7310 Florence Road, Suite 210, Florence, KY 41042; J. Stephen Smith, Michael S. Surrey, and Lynda H. Mathews, Graydon Head & Ritchey, LLP, 2400 Chamber Center Drive, Suite 300, Ft. Mitchell, KY 41017; Hon. Gregory Bartlett, Judge, Kenton Circuit Court, Justice Center, 230 Madison Avenue, Covington KY 41011; and Clerk, Kentucky Court of Appeals, 360 Democratic Drive, Frankfort, KY 40601.

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STATEMENT CONCERNING ORAL ARGUMENT

At issue in this case is whether a sanitation district formed pursuant to KRS 220.135 is entitled to sovereign immunity in light of the Kentucky Supreme Court's decision in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009). Because this is an issue of first impression, Appellee, Sanitation District No. 1, respectfully requests that the Court grant oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Sanitation District No. 1 of Northern Kentucky ("SD1") is a multi-county sanitation district formed pursuant to KRS 220.135 by the fiscal courts of Boone, Campbell and Kenton Counties. It is statutorily charged with responsibility for the prevention and correction of water pollution; the regulation of the flow of streams for sanitary purposes; collecting and disposing of sewage and other liquid wastes produced within its jurisdiction; and, developing and implementing plans for the collection and disposal of storm water. KRS 220.030.

DCI Properties-DKY, LLC ("DCI") is the developer of Manhattan Harbour, an upscale, mixed-use project along the shoreline of the Ohio River in Dayton, Kentucky. (R.A. 958) DCI's plans for the development of Manhattan Harbour called for the relocation and replacement of a 7,423-foot section of a combined sanitary and stormwater pipe line ("sewer line"). (R.A. 958,992) Because the sewer line was part of the larger sewer system owned and operated by SD1, DCI could not relocate the sewer line without SD1's authorization. (R.A. 958) SD1 authorized DCI to relocate the sewer line. (R.A. 992-997)

At the same time, SD1 saw in the Manhattan Harbour development an opportunity to improve water quality by increasing the capacity of its sewer system. (R.A. 959) Specifically, the existing sewer line along the Ohio River ranged in diameter from 24" to 30." (R.A. 992) Pipes of that size are insufficient to accommodate the amount of sanitary sewage that flows through the system during periods of wet weather, resulting in the discharge of significant amounts of raw sewage into the Ohio River annually. The only way to reduce such environmentally

harmful discharges is to increase sewer capacity. Since DCI would be replacing the existing line as part of the development of Manhattan Harbour anyway, SD1 approached DCI about increasing sewer capacity by replacing the existing line with one that was slightly longer and much larger in diameter. (R.A. 992)

DCI agreed, and entered into a contract with SD1 on June 21, 2007. (R.A. 992-997) Under the DCI-SD1 contract, DCI agreed to design and construct a sewer line that was 8,143 feet long and 84" in diameter, and SD1 agreed to purchase the sewer line and all associated easements once construction was complete. (R.A. 992-997) SD1 also agreed to pay DCI for the costs attributable to increasing the length and diameter of the sewer line, which amounted to approximately $10,500,000. (R.A. 992-997)

On July 5, 2007, DCI entered into a separate contract with Coppage Construction under which Coppage agreed to provide labor, materials and services in connection with the installation of the sewer line and other aspects of the Manhattan Harbour development. (R.A. 999-1000) SD1 was *not* a party to the DCI-Coppage contract. (R.A. 999-1000)

In August 2008, a dispute arose between DCI and Coppage over the lack of progress Coppage had made toward completion of the sewer line, as well as delay damages Coppage was seeking from DCI. As a result of the dispute, DCI terminated its contract with Coppage. (R.A. 1-6)

In September 2008, DCI filed suit against Coppage in Kenton Circuit Court, seeking to recover damages from Coppage for breach of the DCI-Coppage contract. (R.A. 1-6)

More than 18 months later, Coppage filed a Third-Party Complaint against SD1.[1] Although there was never any contractual relationship between Coppage and SD1, Coppage sought to recover damages from SD1 for breach of contract. (R.A. 957-1002) Specifically, Coppage asserted a cause of action against SD1 for breach of the DCI-SD1 contract. (R.A. 980-981) In support of that claim, Coppage theorized that it was a third-party beneficiary to that contract, *despite the fact that the DCI-SD1 contract expressly states that there are no third-party beneficiaries.* (R.A. 986-987, 995) Coppage also asserted a cause of action against SD1 for breach of the DCI-Coppage contract, theorizing that SD1 replaced DCI as a party to that contract by novation. (R.A. 980-988) In addition to these "contract" claims, Coppage sought to hold SD1 liable in tort on the basis of *respondeat superior*, joint venture or joint enterprise, partnership by estoppel and negligent management. (R.A. 980-984)

SD1 moved to dismiss Coppage's Third-Party Complaint based on sovereign immunity. (R.A. 1090-1177) Relying on *Comair, Inc. v. Lexington-Fayette Urban Airport Corp.*, 295 S.W.3d 91 (2009), SD1 maintained that an entity's entitlement to immunity is dependent on whether the entity's "parent" is entitled to sovereign immunity and on whether the entity performs a function that is integral to state government. (R.A. 1098-1099)

SD1 argued that it was entitled to sovereign immunity because (1) it was created by county governments which are themselves entitled to sovereign immunity, (2) is controlled by county governments, and (3) is subject to regulation by the state government. (R.A. 1099-1100) In addition, SD1 argued that it performs

[1] *See* Coppage Construction Company, Inc.'s Motion for Leave to File a Third Amended Counterclaim and Initial Third Party Complaint, filed March 10, 2010 (RA 957-1002); Order dated April 29, 2010.

a function that is integral to state government because it "was created to develop, implement and provide for improvements related to sewage disposal, water pollution, and storm drainage," and is thereby responsible for "protect[ing] the health of the Commonwealth's citizens." (R.A. 1101-1103) SD1 emphasized that "effective waste management and treatment is of state (and national) concern because many other communities must share and depend upon the same water resources." (R.A. 1101-1103)

In its briefs before the trial court, Coppage made the same arguments it now advances – that SD1 is a "municipality" and therefore not entitled to sovereign immunity; that SD1 does not carry out functions that are integral to state government; that KRS 220.040 constitutes a waiver of any sovereign immunity that SD1 enjoys; and, that sovereign immunity is not a defense in contract actions.

In a sound and well-reasoned decision, the trial court ruled that SD1 was entitled to sovereign immunity under *Comair* because its "parents" are immune entities and because it performs a function that is integral to state government. (R.A. 1818-1822) The Court astutely observed that SD1 was "established by the County Fiscal Courts in accordance with the provisions of KRS Chapter 220" to "serve the sanitation needs of Campbell, Kenton and Boone Counties," and that, as such, "the 'parents' of the Sanitation District are the three county governments which are themselves immune from suit." (R.A. 1818-1822) In addition, the Court observed that sanitation services are an "important and necessary... vital governmental function" that are subject to the regulations and supervision of state government through the Environmental and Public Protection Cabinet. (R.A. 1818-1822)

In an equally thorough and solid Opinion, the Kentucky Court of Appeals affirmed the trial court's decision. (*See* Appendix B to Appellant's Brief) In upholding the lower court, the Court of Appeals noted that SD1 was "established by the County Fiscal Courts in accordance with KRS Chapter 220 and is controlled by the above counties and the state. As such, [SD1] is an 'arm' of the counties within its geographical boundaries and its 'parents' are the state and the counties it serves." (*See* Appendix B to Appellant's Brief, p. 7-8) In addition, the Court keyed on the statutes that make a "sanitation district's functions ... to prevent pollution of streams, regulate the flow of streams for sanitary purposes, provide collection and disposal of sewage and provide for the management of onsite sewage disposal facilities. See KRS 22.030" and wisely concluded that "providing and maintaining sewer facilities are functions of state-wide concern and are a necessary government function." (*See* Appendix B to Appellant's Brief , p. 8-9)

Having failed to convince either lower court that SD1 was not entitled to sovereign immunity under the *Comair* analysis, Coppage moved for discretionary review, which this Court accepted.

ARGUMENT

I. SANITATION DISTRICT NO. 1 IS ENTITLED TO IMMUNITY UNDER *COMAIR*

Under Kentucky law, it has always been clear that the state enjoys sovereign immunity from liability. *Comair, supra.* It is equally clear that counties, which are viewed as extensions of state government, are entitled to sovereign immunity, and that cities, which are municipal corporations, are not. *Id.* at 94-95. However, determining whether other quasi-governmental boards, commissions and entities are entitled to sovereign immunity is a much murkier issue. *Id.* at 95.

In *Comair*, this Court ruled that two considerations are relevant in determining whether a particular public entity is entitled to sovereign immunity: First, courts must look to "the parent of the entity in question, i.e. was [the public entity in question] created by the state or a county, or a city? This amounts to recognizing that an entity's immunity status depends to some extent on the immunity status of the parent entity." Second, "the more important aspect ... is whether the entity exercises a governmental function ... [i.e.,] a function that is integral to state government." *Id.* at 99. Such functions tend to reflect "the policy of the state at large ... in [an area] that is, or at least can be, a county (and state) concern." *Id.* at 100.

Under that analysis, the trial court and the Court of Appeals correctly ruled that SD1 is entitled to sovereign immunity.

A. BECAUSE BOONE, KENTON AND CAMPBELL COUNTIES CREATED SD1, AND EXERCISE SUBSTANTIAL CONTROL OVER ITS OPERATIONS, SD1 DERIVES SOVEREIGN IMMUNITY FROM ITS COUNTY "PARENTS"

In identifying the parentage of the Lexington-Fayette Urban County Airport Board, the *Comair* Court considered whether the Airport Board was a creature of statute and, if so, what the statutes say about who creates it; whether state, county or city officials appoint members to, or serve as members of, the Airport Board; and whether the state, a county or a city retained control over the Airport Board after its initial formation. *Comair*, *supra* at 100-102.

The *Comair* Court noted that the Airport Board had been created before the City of Lexington and Fayette County merged to form the Lexington-Fayette Urban County Government ("LFUCG"), and it was unclear whether the Airport Board was originally created by the City or by the County. Regardless, the Court noted that the Airport Board was formed pursuant to enabling statutes and that the LFUCG, once formed, assumed significant control over the Airport Board by virtue of those statutes. LFUCG appointed members to the Airport Board, LFUCG officials sat on the Airport Board, LFUCG received annual reports regarding the Airport Board's operations, and LFUCG had the power to exercise regulatory authority over the Airport Board. *Comair*, *supra* at 100-101. Based on those considerations, this Court ruled that the LFUCG was the Airport Board's parent, a factor that weighed in favor of the Airport Board's entitlement to sovereign immunity. *Id.* at 102.

Based on the Court's ruling in *Comair*, the Kentucky Court of Appeals, in an unpublished opinion, determined that Fleming County was the parent of the Fleming County Hospital District for purposes of sovereign immunity analysis.

Fryman v. Fleming Co. Hospital, 2010 Ky. App. Unpub. LEXIS 330 (April 16, 2010) (Appendix A). There, the Court observed that the District had been formed pursuant to KRS 216.310, which allowed counties to form hospital districts. It also noted that the Secretary of the Commonwealth's Cabinet for Health and Family Services served as the secretary for all county hospital districts; that the county judge executive had the authority to appoint members to the District's board; and, that the District was a political subdivision with the statutory authority to enter into contracts, to buy and sell land, to exercise the power of eminent domain, and to tax. On those facts, the court ruled that Fleming County was the District's "parent," a factor that weighed in favor of the District's entitlement to sovereign immunity.

Likewise, SD1's "birth parents" are Campbell and Kenton Counties, and its "current parents" are Campbell, Kenton and Boone Counties.

SD1 was formed pursuant to Chapter 148 of the 1940 Kentucky Acts – the predecessor to KRS Chapter 220. Under the Acts, a *county* initiated the creation of a sanitation district. In that respect, *the county* circulated a petition showing that a requisite percentage of the property owners in the county were in favor of the formation of a sanitation district before such a district may be formed. The *county's* board of health received the petition, certified that the formation of a sanitation district was proper and necessary, and filed it with the Director of the Bureau of Sanitary Engineering of the State Board of Health who served as the Commissioner of Sanitation Districts. 1940 Ky. Acts Chap. 148 §§ 2, 4, 11. Following that statutory framework, the Boards of Health of Kenton and Campbell Counties circulated a petition, certified the propriety and necessity of forming a sanitation district, and

submitted the petition to the Kentucky Commissioner of Sanitation Districts. On December 4, 1946, the Commissioner issued an Order declaring "the Organization of SD1 of Campbell and Kenton Counties," thereby forming SD1 as a political subdivision.[2] (R.A. 1641-1644)

KRS Chapter 220 provides counties substantial control over the sanitation districts they participate in forming. In multicounty districts, such as SD1, the county judge-executives of each of the counties that participate in the district appoint members to the sanitation district's board. KRS 220.140. The county judge-executives also meet at least annually for the specific purpose of reviewing and either approving, amending or disapproving of the sanitation district's proposals with respect to land acquisitions, construction of capital improvement, service charges and user fees, and budgets. KRS 220.035(4). And, whenever a sanitation district proposes a rate increase greater than 5%, each of the fiscal courts of the counties that participate in the sanitation district must vote on the proposed rate increase. The rate increase may be implemented only if a majority of those fiscal courts approve the rate increase. KRS 220.542. In addition, the county fiscal court has the authority to alter the sanitation district's boundaries or to dissolve the district altogether. KRS 220.115. Boone, Kenton and Campbell Counties currently exercise these powers with respect to SD1.

Despite these historical statutory facts, Coppage nevertheless insists that SD1 has municipal "parentage" because a petition was part of the process by which SD1 was formed. According to Coppage, a petition demonstrates that SD1 was formed by

[2] Boone County subsequently became part of SD1, in 1995.

the "solicitation" and "consent" of persons in the service area, which Coppage further contends is a hallmark of a municipal entity. (Appellant's Brief, p. 27) The fact that a petition was involved in the formation of SD1 makes SD1 no less a county entity, given that the petition drive was spearheaded by the county board of health; SD1 was ultimately formed by a state official, i.e., the Kentucky Commissioner of Sanitation Districts; and, the degree of control over SD1 that Boone, Kenton and Campbell Counties exercise, as set forth above.

Indeed, some indicia of municipal involvement in the formation of an entity does not necessarily mean that entity has "municipal" rather than "county" parentage. For example, in *Comair*, there was some indication that the Airport Board had been originally formed by the City of Lexington. Notwithstanding that indication, *Comair* held that the Airport Board had "county" parentage based on the subsequent merger of city and county government, and the extent to which Fayette County exercised control over the Airport Board. *Comair, supra* at 100 ("As noted by the Court of Appeals in *Inco, Ltd.* [*v. Lexington-Fayette Urban County Airport Board*, 705 S.W.2d 933 (Ky. App. 1985)], it is not clear whether the City of Lexington or Fayette County initially created the Airport Board, but upon the merger of the city and the county to create the Lexington-Fayette Urban County Government, 'every function [the city] sponsored became a county agency. ... The record in this case is no clearer as to the origin of the Board, but the principle in *Inco, Ltd.*, is sound. At the merger of the city and the county, the newly formed Urban County Government became the (possibly adoptive) 'parent' entity of the Airport Board. This is further

supported by the fact that the Urban County Government retains significant control over the board. ...").

Likewise, there was some indicia of municipal involvement in the formation of an area planning commission in *N.Ky. Area Planning Commn. v. Cloyd*, 332 S.W.3d 91 (Ky. App. 2010), but the Court of Appeals in that case nevertheless ruled that the area planning commission had "county" parentage. Area planning commissions are formed when two or more adjacent counties and a requisite percentage of cities within those counties elect to consolidate their planning operations into a single entity. KRS 147.610. Participating municipalities have the same role in the formation of the area planning commission as do the participating counties. KRS 147.620 to .640. The plaintiff in *Cloyd* argued that such involvement on the part of the cities in creating the area planning commission rendered those cities "parent" entities of the commission, and that, because the area planning commission had municipal "parents," the commission was not entitled to sovereign immunity. *Cloyd*, *supra* at 8. Despite significant involvement on the part of cities in the formation of the planning commission, the court in *Cloyd* rejected plaintiff's argument and ruled that the "parentage" factor weighed in favor of the planning commission's entitlement to sovereign immunity.

In rejecting the plaintiff's argument, the *Cloyd* court relied heavily on the enabling statutes relevant to the creation of area planning commissions, noting that such statutes "designate the membership of all area planning commissions, describe the commissions' powers and duties of governance," and describe such commissions as "political subdivision[s] ... with power to sue and be sued, contract and be

contracted with, incur liabilities and obligations, [and] levy an annual tax." *Id.* at 4, 6. In light of that statutory framework, the court concluded that area planning commissions were not only political subdivisions of the counties that formed them, but political subdivisions of the Commonwealth as well. *Id.* at 6, 8. Thus, the court ruled that the "parentage" factor weighed in favor of its entitlement to sovereign immunity. *Id.* at 11-12.

Like the enabling statutes in *Cloyd*, the enabling statutes for sanitation districts provide: "The district shall ... be a political subdivision ... with power to sue and be sued, contract and be contracted with, incur liabilities and obligations, exercise the right of eminent domain, assess, tax, and contract for rentals as herein provided, issue bonds, and do and perform all acts herein expressly authorized and all acts necessary and proper for the carrying out of the purpose for which the district was created, and for executing the powers with which it is invested." KRS 220.110(1). Sanitation districts are, therefore, political subdivisions of the state and of the counties that form them, notwithstanding the *possibility* that municipalities could play a minor role in forming them.

In light of the foregoing, there can be no doubt that the "parents" of sanitation districts formed pursuant to KRS Chapter 220 are the counties involved in their formation and management. As such an entity, SD1 derives sovereign immunity from its "parents" - Boone, Campbell and Kenton Counties.

B. BECAUSE SD1 PROMOTES THE COMMONWEALTH'S POLICY OF MAINTAINING A CLEAN WATER SUPPLY, IT PERFORMS FUNCTIONS THAT ARE INTEGRAL TO STATE GOVERNMENT

As the *Comair* Court observed, "sovereign immunity should extend to departments, boards, or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure." *Comair, supra* at 99. In considering whether a particular department, board or agency is an "integral part of state government," the focus is on whether the department, board or agency addresses "concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties). Such concerns include, *but are not limited to*, police, public education, corrections, tax collection, and public highways." *Id.* (emphasis added)

For example, an airport board formed pursuant to KRS Chapter 183 is an integral part of state government because "it exists solely to provide and maintain part of the Commonwealth's air transportation infrastructure." *Id.*

In addition, a local planning commission formed pursuant to KRS Chapter 100 is an integral part of state government because the state has an interest in certain planning and zoning decisions that the planning commission decides. *Cloyd, supra* at 96. As the court in that case observed: "... it is difficult to discern why the General Assembly would have gone to the trouble of granting to commissions certain statutory authority, identified the limits on that authority, and imposed specific responsibilities of planning commissions if a significant state interest was not involved." *Id.*

A county hospital district formed pursuant to KRS Chapter 216 is also an integral part of state government because it "is carrying out the policy of the state at large by carrying out the Legislature's stated purpose of providing 'health and hospital care for the collective benefit of all the people within the area.'" *Fryman, supra* at *8.

And, a nursing home formed by Metcalfe County was found to perform a function that is integral to state government. *Metcalfe County Nursing Home Corp. v. Roberts,* 2013 Ky. App. Unpub. LEXIS 387 (Appendix B). In so ruling, the Court of Appeals stated: "We agree with Appellants that, like transportation and education, and unlike entertainment and golf, caring for the elderly and infirm is a concern 'common to all citizens of the state,' even if it is, or merely could be, addressed on a smaller geographic scale, such as in Metcalfe County. ... Indeed, 'there is perhaps no broader field of [the state's] police power than that of public health.' ... Thus, consistent with their charters and with their origins in service to Metcalfe County, Appellants perform an integral governmental function for the citizens of Metcalfe County and the surrounding region." *Id.* (internal citations omitted).

Because SD1 also performs a function that is integral to state government, it is entitled to sovereign immunity. Like the Airport Board in *Comair*, the planning commission in *Cloyd* and the county hospital district in *Fryman*, SD1 was established pursuant to a statutory framework that renders sanitation districts subject to "regular patterns of administrative organization and structure." Indeed, KRS Chapter 220 dictates how sanitation districts are to be formed, organized and governed.

As in *Fryman*, the state is heavily involved in the formation, organization and structure of sanitation districts. In *Fryman*, the Secretary of the Cabinet for Health and Family Services served as the commissioner for all county hospital districts. The Secretary of the Energy and Environment Cabinet serves the same role for sanitation districts. KRS 220.020. Petitions seeking the formation of a sanitation district are filed with the Secretary. He or she then establishes the sanitation district's boundaries, which may or may not be precisely the same as those proposed in the petition, KRS 220.080; publishes notice of the application and defends any objections to the formation of the district, KRS 220.090 - .100; ultimately declares the district organized; and, records its articles of incorporation with the Secretary of State, KRS 220.110.

Moreover, SD1 and other sanitation districts in this Commonwealth address critically important concerns that are common to all the citizens of this state. Public health, the water supply, and environmental protection are concerns that are common to all of the citizens of Kentucky – so much so, in fact, that the state has created the Energy and Environment Cabinet, an entire Title of the Kentucky Revised Statutes dedicated to "Public Health," chapters therein dedicated to "Sanitation Districts" and "Environmental Protection," and a regulatory scheme devoted to the protection of the water supply and the disposal of waste water. *See* KRS Title XVIII; KRS Chapters 220 and 224; and Ky. Adm. Reg. Title 401.

One of those provisions unequivocally states that the "policy of this Commonwealth [is] to conserve the waters of this Commonwealth for public water supplies, for the propagation of fish and aquatic life, for fowl, animal wildlife and

arboreous growth, and for agricultural, industrial, recreational and other legitimate uses; to provide a comprehensive program in the public interest for the prevention, abatement and control of pollution; to provide effective means for the execution and enforcement of such programs; and, to provide for cooperation with agencies of other states or of the federal government in carrying out these objectives." KRS 224.70-100. Sanitation districts, like SD1, serve these noble interests by preventing and correcting the pollution of streams, regulating the flow of streams for sanitary purposes, cleaning and improving stream channels for sanitary purposes, collecting and disposing of sewage and other liquid wastes produced within their jurisdiction, and developing and implementing plans for the collection and disposal of storm water. KRS 220.030.

Of course, each sanitation district addresses these concerns on a local level, as *Comair* specifically contemplated. *Comair*, *supra* at 99 ("The focus, however, is on state level governmental concerns that are common to all of the citizens of this state, *even though those concerns may be addressed by smaller geographic entities* (e.g., by counties).") But the simple fact remains that these are issues of statewide concern. Waterways, after all, are interconnected. Pollution that occurs in one stream affects all the waterways into which that stream eventually flows, such that pollution cannot necessarily be contained within the jurisdiction in which it originates. Likewise, the citizens of this Commonwealth are mobile, and the residents of one county frequently utilize waterways in other counties. Thus, if one county's waterways are polluted, the effect reaches well beyond the citizens of that county.

Because pollutants affect the health of those exposed to them, it necessarily follows that pollution anywhere in the Commonwealth is a statewide public health concern.

SD1 provides an infrastructure much like the Airport Board did in *Comair*. *Id.* at 100-102. By far, SD1's largest responsibility is building and maintaining the vast web of pipes that collect and carry raw sewage and other liquid waste from innumerable points within SD1's multi-county service area to plants where that wastewater is treated and disposed of in an environmentally responsible manner. Because it exists "to provide part of the Commonwealth's infrastructure" for the collection and disposal of raw sewage, SD1 serves and addresses a concern that is common to all of the citizens of this state. *Comair, supra* at 101.

In sum, because it engages in a function that is integral to state government, SD1 is entitled to sovereign immunity.

C. COPPAGE'S RELIANCE ON *CALVERT* IS MISPLACED BECAUSE *CALVERT* WOULD NOT BE DECIDED THE SAME WAY UNDER *COMAIR*

Coppage relies heavily on *Calvert Investments, Inc. v. Louisville & Jefferson Co. Metropolitan Sewer District*, 805 S.W.2d 133 (Ky. 1991), for the argument that SD1 is not entitled to sovereign immunity. (Appellant's Brief, p. 14-15, 17, 19) That reliance is misplaced, because *Calvert* would not be decided the same way under *Comair*.

In *Calvert*, the Court considered whether a metropolitan sewer district[3] was entitled to sovereign immunity in a breach of contract action. Ultimately, the *Calvert*

[3] A metropolitan sewer district is formed by a city pursuant to KRS Chapter 76, and thereafter largely controlled by the city. In that respect, it is markedly different from a sanitation district, which is

Court ruled that the metropolitan sewer district was not entitled to such immunity, applying a two-pronged test derived from *Gnau v. Louisville & Jefferson Co. MSD*, 346 S.W.2d 754 (Ky. 1961), and *Ky. Center for the Arts v. Berns*, 801 S.W.2d 327 (Ky. 1990). *Calvert, supra* at 135-137. The *Comair* Court, however, specifically rejected that two-pronged test. In so doing, the *Comair* Court said:

> ...the two-pronged "test" was useful in *Berns*, but is best left to that case. The two prongs (or factors) were an attempt to lay down a simple formula to determine whether the entity in question was an arm of the central state government (rather than a purely local, municipal corporation). Unfortunately, the test was overly simple, failing to allow for subtlety, and too limiting. For example, because it focuses on whether the entity is a direct arm of the state, it overlooks that an entity that is the arm of a county (which in turn is a direct administrative subdivision of the state) might also qualify. *In fact, because of this state-level focus, the two-pronged test is too easy to overconstrue, which arguably happened in the early cases applying it and arguably led to inconsistent results.*

Comair, supra at 99 (emphasis added).

Calvert is one of those "early cases"[4] that was confused by the "state-level focus" in *Berns* and therefore overconstrued *Berns'* two-pronged test. *Calvert* construed *Berns* in such a way that only state agencies are entitled to sovereign immunity. In ruling that the Louisville and Jefferson County Metropolitan Sewer District was not entitled to sovereign immunity, *Calvert* first noted that "sovereign immunity should extend only to 'departments, boards or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure." *Calvert, supra* at 136-137. It then

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established pursuant to KRS Chapter 220 by the state at the behest of one or more counties, and thereafter controlled by those counties.

[4] Notably, *Calvert* was decided on March 14, 1991, less than three months after the *Berns* decision was issued on December 27, 1990.

concluded that the District did not satisfy that standard – i.e., did not carry out a function that was integral to state government – because it was not a state agency. *Id.* at 137 (criticizing prior case holding that a metropolitan sewer district is a state agency entitled to sovereign immunity). In other words, *Calvert* construed *Berns* to mean that an agency carries out a function that is integral to state government if that agency is under the direction and control of state government, i.e. if it is a *state* agency. That amounts to an "all-or-nothing" approach that entitles state agencies, and only state agencies, to sovereign immunity. As *Comair* makes painfully clear, such a narrow approach is no longer the rule. *Comair, supra* at 99.

A post-*Comair* court deciding the immunity status of the Louisville and Jefferson County Metropolitan Sewer District would most certainly conclude that the District performs a function that is an integral part of state government. Because *Comair* requires it, such a court would consider numerous factors that the *Calvert* Court did not – including, but not limited to, the statutory framework under which the District was formed, the governance and powers of the District, state policy regarding water quality as reflected by state statute and regulations, and the extent to which the District carries out that policy. Consideration of those factors would require a conclusion that the District is an integral part of state government.

II. GRANTING IMMUNITY TO SD1 WOULD NOT GRANT BLANKET IMMUNITY TO ALL SPECIAL SERVICES DISTRICTS OPERATING IN KENTUCKY

While perhaps better directed to the General Assembly, Coppage devotes a great deal of its brief contending that there are a large number of special services districts in Kentucky and criticizing the supposed "lack of accountability" of those

special services districts, including SD1. (Appellant's Brief, p. 3-4, 8-12) Ultimately, Coppage expresses the concern that "affirming the Court of Appeals' decision would justify extending sovereign immunity to ***all*** of the thousand-plus special services districts operating in Kentucky." (Appellant's Brief, p. 15) (emphasis in original).

Coppage's fear is unfounded, and ignores the teachings of *Comair*. Not every special services district in Kentucky will be entitled to sovereign immunity under *Comair* just because this Court rules that SD1 is entitled to such immunity. Rather, only those special services districts that meet the two-part test in *Comair* – i.e., those that can establish *both* "county" parentage *and* that they serve a function that is integral to state government – will be entitled to sovereign immunity.

Neither the "Ghost Government" report nor the "County Government in Kentucky" publication on which Coppage relies so heavily identifies how many of the approximately 1,200 statutorily authorized special services districts in Kentucky have "county" parentage. Undoubtedly, however, a good number of special services districts have "municipal" or other parentage and would, therefore, not be entitled to sovereign immunity on a tort or contract claim. For example, ambulance service districts (KRS 108.100(1)), fire protection districts (KRS 75.010 et seq), flood control districts (KRS 104.470), industrial development authorities (KRS 154.50-316), local air boards (KRS 183.132), management districts (KRS 91A.555), mass transit authorities (KRS 96A.020), metropolitan sewer districts (KRS 76.020), and riverport authorities (KRS 65.510) may all be created by cities. And other special services districts, such as soil conservation districts, do not necessarily have "county" parentage. KRS 262.100.

Of course, special services districts are not entitled to sovereign immunity under *Comair* if they do not have "county" parentage. Since many special services districts cannot meet this criterion, Coppage's fear that "affirming the Court of Appeals' decision would justify extending sovereign immunity to ***all*** of the thousand-plus special services districts operating in Kentucky" is unfounded.

Likewise, even if a special services district can establish "county" parentage, it is not entitled to sovereign immunity under *Comair* unless it performs a function that is integral to state government. Not all special services districts can satisfy that criterion. For example, community action agencies are formed for the purpose of alleviating poverty in a given community or area by developing employment opportunities. KRS 273.410(2). Likewise, soil conservation districts are formed for the purpose of conserving and developing renewable resources within a small portion of a county. KRS 262.010 et seq. And, local tourist and convention commissions are formed to promote a given locality as a venue for tourism and conventions. KRS 91A.350 et seq.

Under *Comair*, special services districts are not entitled to sovereign immunity if they do not perform a function that is integral to state government. Since many special services districts cannot meet this criterion, Coppage's contention that "affirming the Court of Appeals' decision would justify extending sovereign immunity to ***all*** of the thousand-plus special services districts operating in Kentucky" is quite the overstatement.

III. SD1 IS IMMUNE FROM COPPAGE'S "CONTRACT" CLAIM BECAUSE THERE IS NO WRITTEN CONTRACT THAT EXPRESSLY OBLIGATES SD1 TO PAY COPPAGE ANY AGREED UPON SUM

Coppage does not have a lawful written contract with SD1, and SD1 never agreed to compensate Coppage for its construction of the upsized sewer line. Rather, Coppage only has an express written contract with *DCI*, the developer, which includes constructing the entire sewer line for the Manhattan Harbour Development, not just upsizing the line.

The only "contract" claims asserted by Coppage in its Initial Third Party Complaint against SD1 are for: (1) breach of the DCI/Coppage contract in which Coppage alleges that SD1 replaced DCI by novation and (2) as a third party-beneficiary to the SD1/DCI contract, despite the express terms of such contract stating there are no third-party beneficiaries. Coppage's remaining claims are based in tort.

The nature of Coppage's breach of contract claim is important. There has been some *suggestion* in Kentucky law that a governmental entity other than the Commonwealth[5] is not immune from liability where a breach of contract action is premised on the government's failure to pay a fixed sum, in violation of an express duty set forth in a valid, written contract between the county and the plaintiff. The cases upon which Coppage chiefly relies, including *Illinois Central Gulf RR Co. v. Graves County Fiscal Ct.*, 676 S.W.2d 470 (Ky. App. 1984), *St. Matthews Fire Protection Dist. v. Aubrey*, 304 S.W.3d 56 (Ky. App. 2009) (" as a general rule

[5] The General Assembly has waived sovereign immunity for contract claims against the Commonwealth, such that sovereign immunity does not apply to such claims. KRS 45A.245. That waiver, however, does not extend to governmental entitles other than the Commonwealth. *George Eady Co. v. Jefferson County*, 551 S.W.2d 571 (Ky. 1977). *See also Trace Creek Construction, Inc. v. Harlan County Fiscal Ct.*, 2008 WL 1991647 (unpublished) (Appendix C).

sovereign immunity does not defeat a *valid* contract claim"), and *Patrick v. Magoffin County*, 2000 WL 35800547 (E.D. Ky.) (unpublished) (interpreting Kentucky law), so *suggest*. (Appellant's Brief, p. 33-35) *But see Trace Creek Construction, Inc. v. Harlan County Fiscal Ct.*, 2008 WL 1991647 (Ky. App.) (unpublished) (Appendix C) (holding that Harlan County was entitled to sovereign immunity on a breach of contract claim premised on an express contractual duty).

But for Coppage to say that *Ill. Central* so *held*, however, is quite a stretch. As a subsequent Kentucky Court of Appeals panel noted, *Ill. Central* "pondered the question of sovereign immunity when counties were involved in lawful contracts. It ended, however, by noting that '[w]hether the contract between the parties was a lawful one ... has not been considered by the trial court, and these matters are not yet ripe for our consideration.'" *Blankenship v. Lexington-Fayette Urban Co. Govt.*, 2010 Ky. App. LEXIS 145 (unpublished) (Appendix D), quoting *Ill. Central, supra* at 472. As a result, because the question was not ripe for consideration, the *Ill. Central* court's opinion can only be considered advisory.

Moreover, unlike *Ill. Central*, *Aubrey*, and *Patrick*, the case at hand is *not* a case in which Coppage's breach of contract claim is premised on SD1's failure to pay an agreed upon sum, in violation of an express duty set forth in a valid written contract between Coppage and SD1. Indeed, *there is no contract between SD1 and Coppage*. And, in stark contrast to *Ill. Central*, *Aubrey*, and *Patrick*, Coppage's breach of contract claim is premised on an alleged novation and its alleged status as a third party beneficiary of the contract between SD1 and DCI. Thus, *Ill. Central*, *Aubrey*, and *Patrick* have no application to the present case.

Coppage's reliance on *George M. Eady Co. v. Jefferson County*, 551 S.W.2d 571 (Ky. 1977) is equally misplaced. Coppage contends that *Eady* "expressly held that KRS 45A.245 does not apply to suits against counties." (Appellant's Brief, p. 34) Contrary to Coppage's assertion, KRS 45A.245 is not even mentioned in the *Eady* opinion.

Kentucky law is clear that sovereign immunity extends to breach of contract claims when those claims are premised on anything other than the alleged breach of an express duty set forth in a valid written contract between the government and the plaintiff. For example, in *Ammerman v. Bd. of Educ. of Nicholas County*, 30 S.W.3d 793, 797 (Ky. 2000), the Kentucky Supreme Court ruled that a claim arising from the alleged breach of an implied contractual duty to protect teachers from sexual harassment was "unmistakably" barred by sovereign immunity. *See also Com. v. Aubrey*, 2010 Ky. App. LEXIS 214 (unpublished) (Appendix E) ("Even though the defense of sovereign immunity usually arises in tort claims, the doctrine of sovereign immunity has also been applied in contract actions and has given the Commonwealth immunity from suits for breach of contract."); *Trace Creek Construction, Inc. v. Harlan County Fiscal Ct.*, 2008 WL 1991647 (unpublished) (Appendix C) (holding that a contractor's claim against a county for damages in breach of contract was barred by sovereign immunity); *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978) (doctrine of sovereign immunity "extends to both actions in tort and contract); *Foley Construction Co. v. Ward*, 375 S.W.2d 392 (Ky. 1963) (sovereign immunity barred breach of contract claim).

Applying the legal principles from these cases to the facts at hand, SD1 is entitled to immunity on Coppage's breach of contract claims.

CONCLUSION

Because Sanitation District No. 1 has county "parentage" and performs a function that is integral to state government, it is entitled to sovereign immunity from the claims in Coppage's Third Party Complaint. Sanitation District No. 1 therefore respectfully requests that this Court affirm the decisions of the Kentucky Court of Appeals and the Kenton Circuit Court in all respects.

Respectfully submitted,

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